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IN THE

Supreme Court Of The United States

October Term, 1972

No. 72-437

JOHN A. MADER, et al.,

Petitioners.

v.

DANIEL E. ARMEL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

It is the position of respondent Todd Tibbals that the petition for writ of certiorari should be denied for the reason that the case is not one of general importance and presents no questions as to which there is a conflict of decisions between Courts of Appeals, and for the further reason that the issues presented were correctly decided by the District Court and the Court of Appeals.

QUESTIONS PRESENTED

1. Was respondent Todd Tibbals "a controlling person" within the meaning of Section 20 (a) of the Securities Exchange Act of 1934, under the circumstances of this case.

2. Did respondents act "in good faith" within the meaning of Section 20 (a) of the Securities Exchange Act of 1934, under the circumstances of this case.

COUNTER-STATEMENT

Certified Credit Corporation (Credit) was the principal corporation in a corporate group which included Certified Mortgage Corporation (Mortgage). Mortgage was merged into Credit on December 31, 1959, under a plan and agreement of merger adopted by the boards of directors of the two corporations on November 16, 1959, and approved by the shareholders of the corporations at special meetings on December 10, 1959. The proxy solicitation material and proxy statement mailed to shareholders before the special meetings on December 10, 1959, were prepared jointly by Daniel Armel, a director and president of both corporations, and the dominant figure in the corporate group, and Joseph DeVennish, counsel for both corporations.

The District Court found the proxy statement to contain material misstatements and omissions in violation of Section 10 (b) of the Securities Exchange Act of 1934.

Respondent Tibbals is and was at the time an architect. He owned no stock in either corporation. He was elected a director of Credit at the annual shareholders meeting in June 1959, and attended the November 16, 1959 meeting of the board of directors — the first meeting following his election — and voted for the merger. He had no knowledge that the proxy statement contained misstatements and omissions.

The District Court found that Tibbals was not "a controlling person" within the meaning of Section 20 (a) of the Securities Exchange Act of 1934 and dismissed the

action as to him. The Court of Appeals affirmed the decision.

REASONS FOR DENIAL OF WRIT

1. Contrary to petitioners' representations, the decision (as to the liability of respondent Tibbals) which they seek to have reviewed does not rest upon an erroneous interpretation of Section 20 (a) of the Securities Exchange Act of 1934, and it is not in conflict with *McKy* v. *Hochfelder*, CCH, ¶93,601 (7th Cir. 1972), discussed below. It is principally a determination from the facts that Tibbals, a newly elected outside director, did not "control" the persons — inside directors and officers — found to have violated Section 10 (b) of the Securities Exchange Act of 1934.

The issue was decided by the trial court, and affirmed by the Court of Appeals, within the rule of the lower court cases that "control" within the meaning of Section 20 (a) is a question of fact. *Stadia Oil & Uranium Company* v. *Wheelis*, 251 F. 2d 269 (10th Cir. 1957); *Smith* v. *Bear*, 237 F. 2d 79 (2nd Cir. 1956); *Klapmeier* v. *Telecheck International, Inc.*, 315 F. Supp. 1360 (5th Div. Minn. 1970); *Jackman* v. *Erwin*, 186 F. Supp. 681 (S. D. Tex. 1959); *In re Battery Securities Corporation*, 38 Sec. & Ex. Com. Dec. & Rep. 8991 (1957).

In *Stadia Oil & Uranium Company* v. *Wheelis*, the court held, on this point:

> "Defendant Rankin contends that he is not liable to the plaintiffs because he did not participate in the stock sale to them. Plaintiffs concede that Rankin's liability arises only by reason of the so-called 'control' provisions of the Act 77o. The statute does not define the terms 'controls', 'controlled', or 'controlling'. These terms should be given a broad definition to permit the applicable provisions of the Act to

become effective whenever the fact of control actually exists. ***On the issue here presented the evidence was sharply conflicting. Rankin was one of the organizers of the company, its vice-president, and one of its three directors. His connection with the stock sales is shown by evidence that he presided over, and participated in, board meetings where the sale and disposition of the company stock was discussed and authorized. As vice-president he signed two of the Smith certificates. He was the one officer of the company who had had business dealings with Morrison prior to 1955. While he flatly denied any knowledge of, or participation in, the stock sales here under consideration, the evidence is such that the jury could reasonably infer that he 'controlled the corporation' and had knowledge of the stock sales in question. The jury resolved this factual issue against Rankin. Under the circumstances, the verdict of the jury must stand."

(215 F. 2d 275)

The rule is treated in Vol. II Loss, Securities Regulation, 2nd Ed., page 781:

"The question has been much mooted whether a person's status as an officer or director in itself makes him a controlling person for purposes, for example, of registration under the Securities Act or disclosure by a broker-dealer of a control relationship with the issuer under the Commission's Exchange Act fraud rules. The Investment Company Act, as we have seen, specifically negatives control when the 'power to exercise a controlling influence *** is solely the result of an official position'. But even there the Commission held that an individual was a controlling person when his being president was the *result* rather than the *source* of his power; in that case the president owned less than 3 percent of the company's voting stock, but he had the confidence of four family groups which together accounted for over 31 percent. Accordingly, although

a persons being an officer or director does not create any *presumption* of control, it is a sort of red light. It may take only one or two questions to bring out that a particular officer has no substantial influence or that a particular director represents a minority interest (perhaps as the result of cumulative voting) which is out of sympathy with the controlling block. On the other hand, the answer to the first few questions may demonstrate the need for a fairly extensive inquiry into the overall relationship of the particular officer or director to the rest of the managing group."

Applying this rule to the special circumstances of this case, the District Court found, and the Court of Appeals concurred, that Tibbals did not control the corporate insiders who violated Section 10 (b) of the Exchange Act. And, contrary to petitioners' bald assertion, there is nothing in this decision which puts it in conflict with *McKy* v. *Hochfelder*, CCH, ¶93,601 (7th Cir. 1972).

McKy was an action under Section 20 (a)[1] for recovery against a brokerage firm as a result of the Section 10 (b) violations of its president. The appellate court held that the brokerage firm was liable by force of Section 20 (a) jointly and severally with its president under an agency relationship theory. The same theory will not support "control" here, however, because the action is not against the corporation (the principal) but against Tibbals, and the others, individually. And unlike the relationship between a corporation and its officers, there is no agency relationship between codirectors or corepresentatives. This latter principle is expressed in Annot., 65 ALR2d 1019, 1027 (1959), as follows:

"***But it is clear that the mere status of corepresentation does not make each corepresentative

1. The related questions in *McKy* do not bear upon the questions presented by this petition.

> liable for any misconduct by a cofiduciary — something more must be shown. This principle has been expressly applied, stated, or supported by clear implication in a large number of cases".

The same principle is stated in Annot., 25 ALR3rd 941, 1046 (1969) with regard to codirectors:

> "It is a general rule that directors are not liable for the wrongful acts of their codirectors if they do not connive at them, and it is an accepted business practice to give individual directors specific duties of supervision to perform as members of the board."

Had Congress intended a different rule with the enactment of Section 20 (a), it is likely that a provision similar to the following provision in Section 11 (a) of the Securities Act of 1933 (15 USCA §77k) would have been added:

> "(2) every person [shall be liable on account of a false registration statement] who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted."

It follows that whatever the disposition of the petition for writ of certiorari in *McKy* v. *Hochfelder*, the case cannot be authority for peitioners' position here.

In summary, the issue of control under Section 20 (a) of the Exchange Act is one of fact, and the determination of this issue by the lower courts in this case can have only local impact. Certainly, there is no general importance to this case, because of this issue, which warrants exercise of this Court's jurisdiction within the rule of previous cases that writs of certiorari will be granted sparingly. See *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175 (1938); *Forsyth* v. *Hammond*, 166 U. S. 506 (1897); *In re Lau Ow Bew*, 141 U. S. 583 (1891).

2. Both questions 2 and 3, as presented by petitioners, relate to the issue of the availability to respondents, under the special circumstances of this case, of the defense of "good faith" under Section 20 (a). This issue was not reached as to Tibbals because he was found not to be a "controlling person" under Section 20 (a). However, like question 1, questions 2 and 3, considered either singly or together, present factual issues which, from their very nature, ought not be the basis for invoking the jurisdiction of this Court.

CONCLUSION

The decision of the Court of Appeals is narrowly tied to the special facts of this case and there is no showing of conflicting decisions in other circuits. For these reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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TODD TIBBALS

APPENDIX

Section 10 (b) Securities Exchange Act of 1934 (15 U.S.C.A. §78 j (b).

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

*** *** *** *** ***

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 20 (a) Securities Exchange Act of 1934 (15 U.S.C.A. §78t (a).

(a) Every person, who, directly or indirectly controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.